DOCUMENT RESUME

ED 091 842 EA 006 199

TITLE	Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance: Nondiscrimination on the Basis of Sex. Part 2.
INSTITUTION	Department of Health , Education, and Welfare, Washington., D.C. Office of the Secretary.
PUB DATE	Jun 74
NOTE	15p.
JOURNAL CIT	Federal Register; v39 n120 p22228-40 Jun 20 1974
EDRS PRICE	MF-$0.75 HC-$1.50 PLUS POSTAGE
DESCRIPTORS	Admission (School); Admission Criteria; After School Activities; Athletic Activities; College Housing; Elementary Education; Employment Opportunities; Federal Government; *Federal Legislation; Higher Education; Married Students; Recruitment; Secondary Education; *Sex Discrimination; Student Loan Programs; Teacher Employment; Teacher Salaries
IDENTIFIERS	*Title IX

ABSTRACT

Title IX, of the Education Amendments of 1972, provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," with certain exceptions. This report contains proposed rules to implement Title IX. The report includes definitions and provisions concerning remedial affirmative actions, required assurances, dissemination of information policies, and other general matters related to sex discrimination. It describes the educational institutions and other entities, whether public or private, which are covered in whole or in part by the proposed regulations and sets forth the general and particular prohibitions with respect to nondiscrimination based on sex in admissions policies and admission preferences. Also set forth are rules with respect to prohibited discrimination in educational programs and activities and employment in educational programs and activities. Finally, the report provides the procedures which would govern the implementation of the proposed regulations--effecting compliance, conducting hearings, rendering decisions, and issuing notices. (Author/JF)

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federal register

THURSDAY, JUNE 20, 1974

WASHINGTON, D.C.

Volume 39 ■ Number 120

PART II

BEST COPY AVAILABLE

ED 091847

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

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EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

Nondiscrimination on the Basis of Sex

EA 006 199

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

[45 CFR Part 86]

EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

Nondiscrimination on the Basis of Sex

The Office of Civil Rights of the Department of Health, Education, and Welfare proposes to add Part 86 to the Departmental Regulation to effectuate Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 *et seq.*), except sections 904 and 906 thereof (20 U.S.C. 1684 and 1686), with regard to Federal financial assistance administered by the Department. Title IX provides that "no person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," with certain exceptions. Title IX is similar to Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*) except that Title IX applies to discrimination based on sex, is limited to educational programs and activities, and includes employment.

Subpart A of these proposed regulations (§§ 86.1 through 86.9) includes definitions and provisions concerning: remedial and affirmative actions, required assurances, dissemination of information policies, and other general matters related to discrimination on the basis of sex. The Subpart also explains the effect of state or local laws and other requirements.

Subpart B (§§ 86.11 through 81.16) describes the educational institutions and other entities, whether public or private, which are covered in whole or in part by the proposed regulations. It also includes exemptions as to admissions for certain educational institutions, as set forth in the statute, but it should be noted that these exemptions are limited to admissions. This Subpart defines "admissions," and describes certain educational institutions which are eligible to submit transition plans designed to convert their single-sex admissions processes to nondiscriminatory processes over a stated period of time not to exceed seven years from the date of enactment of Title IX (i.e. by June 24, 1979).

Subpart C (§§ 86.21 through 86.23) sets forth the general and particular prohibitions with respect to nondiscrimination based on sex in admissions policies and admission preferences, including requirements concerning recruitment of students. The regulatory requirements regarding treatment of students and employment (Subparts D and E) are applicable to all educational institutions receiving Federal financial assistance, including those whose admissions are exempt under Subpart C.

Subpart D (§§ 86.31 through 86.38) sets forth the general rules with respect to prohibited discrimination in educational programs and activities. The specific subject matter covered in Subpart D includes discrimination on the basis of sex in academic research, extracurricular and other offerings, housing, facilities, access to programs and activities, financial and employment assistance to students, health and insurance benefits for students, physical education and instruction, athletics, and discrimination based on the marital or parental status of students.

Subpart E (§§ 86.41 through 86.51) sets forth the general rules with respect to employment in educational programs and activities. The specific subject matters covered are discrimination on the basis of sex in hiring and employment criteria, recruitment, compensation, job classification and structure, promotions and termination, fringe benefits and leave, advertising, pre-employment inquiries, and discrimination with respect to marital or parental status. It also includes provisions for exemptions where sex is a *bona fide* occupational qualification.

Subpart F (§§ 86.61 through 86.66) sets forth the procedures which would govern the implementation of the proposed regulations, including procedures for effecting compliance, conducting hearings, rendering decisions and issuing notices. It also includes provisions concerning the applicability of administrative and judicial review. Section 86.11, in Subpart A, provides that the regulations apply "to each education program or activity which receives or benefits from Federal financial assistance" administered by the Department. Under analogous cases involving constitutional prohibitions against racial discrimination, the courts have held that a school district's or college's education functions include any service, facility, activity or program which it operates or sponsors, including athletics and other extracurricular activities. These precedents have been followed with regard to sex discrimination; see Brenden v. Independent School District 742, 477 F. 2d 1292 (8th Cir. 1973).

Section 86.63(c), in Subpart F, provides, as Title IX requires in 20 U.S.C. 1682, that termination or refusal to grant or continue such assistance "shall be limited in its effect to the particular education program or activity" in which noncompliance has been found. The Secretary proposes to interpret section 86.63 (c) consistently with the interpretation of similar language contained in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–1). He proposes, therefore, that an education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it receives or benefits from such assistance. This interpretation is consistent with the leading case interpreting the language contained in Title VI, which holds that Federal funds may be terminated under Title VI only upon a finding they "are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment * * *" Board of Public Instruction of Taylor County, Florida v. Finch, 414 F. 2d 1068, 1078–79 (5th Cir. 1969).

A more detailed discussion of various sections in each of the Subparts of the proposed Title IX regulations is set forth in the following paragraphs. In certain cases, major issues and the reasons for the proposed decision are discussed.

Subpart A. Section 86.2 generally provides definitions. Of particular note is § 86.2(o) which provides that where an educational institution is composed of more than one school, department or college, admission to which is independent of admission to any other component, each such school, department or college is considered as a separate unit for the purposes of determining whether its admissions are covered by the regulation. Thus, if a private institution is composed of an undergraduate and a graduate college, admissions to the undergraduate college are exempt (see discussion under Subpart B below) but admissions to the graduate school are not.

Section 86.3(a) requires remedial action to overcome the effects of previous discrimination based on sex in a Federally assisted educational program or activity. Remedial action pursuant to § 86.3(a) is restricted to areas of a recipient's educational program or activity which are not exempt from coverage. Section 86.3(b) permits, but does not require, affirmative action to overcome the effects of conditions which have resulted in limited participation by members of either sex. The Department will not require imposition of quotas under either of these sections.

Section 86.4 requires each recipient of Federal financial assistance to submit to the Director an assurance that each of its educational programs and activities receiving or benefiting from such assistance will be conducted in compliance with the regulations.

Subpart B. Section 86.13 of the regulation provides that all public and private military schools that are recipients of Federal financial assistance, whether secondary or post-secondary, are exempt from coverage. Neither the statute nor the regulation applies to U.S. military and merchant marine academies since these schools are Federal entities rather than recipients of Federal assistance.

Section 86.12 provides that the regulation does not apply to religiously controlled institutions to the extent that such application would be inconsistent with the religious tenets of the controlling organization. An educational institution wishing to claim an exemption on the ground of religion must do so in writing to the Director when it files its assurance of compliance pursuant to § 86.4. The institution would be required to set forth the manner and extent to which application of the regulation would not be consistent with the religious tenets of its controlling organization.

The statute covers admissions only in certain institutions: vocational, professional, graduate, and public undergraduate institutions, except such of the latter as from their founding have been

traditionally and continually single-sex. The admissions policies of private undergraduate institutions are exempt. Under the statute and § 86.14, the admissions requirements do not apply, in general, to admissions to public or private preschool, elementary and second schools. Because the statute mandates such coverage as to vocational schools, however, admission to public or private vocational schools, whether at the junior high school, high school or post-secondary level, are covered by § 86.14(c) and must be nondiscriminatory. With respect to coverage of admissions to institutions of professional and vocational education, the Secretary has interpreted the statute as excluding admissions coverage of professional and vocational programs offered at private undergraduate schools. Thus, admission to programs leading to first degrees in fields such as teaching, engineering, and architecture at such private colleges will be exempt under § 86.14(d). While the admissions section of the statute might be read as including professional degrees wherever they are offered, the statute can also be read as stating, and the legislative history indicates, that admissions to private undergraduate schools were to be totally exempt.

The exemption in § 86.14(d) for admissions to public traditionally and continually single-sex undergraduate institutions will affect only a few institutions. Likewise, section 86.15 of the regulation, concerning transition by single-sex institutions whose admissions are covered by the statute into institutions with nondiscriminatory admissions practices, will affect relatively few institutions.

Subpart C. Subpart C prescribes (subject to the appropriate admissions exemptions) requirements for nondiscrimination in recruitment and admission of students to educational programs and activities. In addition to a general prohibition of discrimination in § 86.21(a), the regulations delineate, in § 86.21(b), specific prohibitions based on sex relating to such practices as ranking of applicants, application of quotas, and administration of tests or selection criteria. Use of tests for admission which are shown to have an adverse impact on members of one sex must be shown to predict validly the successful completion of the educational program or activity in question (§ 86.21(b)(2)). Further, in connection with this prohibition, § 86.22 of the regulation forbids a recipient from giving preference to applicants on the basis of their attendance at particular institutions if the preference results in discrimination on the basis of sex. Such preferences may be permissible under that section, however, if the granting institution can show that the pool of applicants eligible for such a preference includes roughly equivalent numbers of males and females, or if it can show that the total number of applicants eligible to receive the preference is insignificant in comparison to its total applicant pool.

Specific prohibitions in Subpart C also forbid applying rules concerning such matters as marital or parental status in a manner which discriminates in admissions on the basis of sex (§ 86.21(c)(1)). Section 86.21(c)(2) prohibits discrimination on the basis of pregnancy and related conditions, and § 86.21(c)(3) provides that recipients shall treat disabilities related to such conditions in the same manner and under the same policies as any other temporary disability or physical condition is treated.

The last section of Subpart C, § 86.23, requires generally that comparable efforts be made by educational institutions to recruit members of each sex. Additional recruitment efforts directed primarily toward members of one sex must be undertaken to remedy past discrimination (pursuant to § 86.3(a) in Subpart A), and such additional efforts may also be taken absent past discrimination in order to correct the effects of conditions which have had the effect of limiting the admissions of members of one sex, to the recipient's educational program or activity (pursuant to § 86.3(b)). Finally, a recipient may not, under § 86.23(b), recruit primarily or exclusively at institutions whose student bodies are exclusively or predominantly single-sex if the effect of such recruitment efforts is to discriminate on the basis of sex.

Subpart D. Subpart D concerns the prohibition of discrimination in treatment of students in educational programs and activities. Generally, § 86.31(a) states that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other educational program or activity operated by a recipient and which receives or benefits from Federal financial assistance. This provision is followed by specific prohibitions in § 86.31(b) which include: discriminating on the basis of sex in the application of any rules of appearance, or in the application of rules of domicile and residency (as discussed below), and aiding or perpetuating sex discrimination by assisting any agency, organization or person which discriminates on the basis of sex in providing any aid, benefits, or services to students or employees. Section 86.31(a) does permit an institution to assist its students in seeking admission to an education program which discriminates, if that admissions discrimination would be permissible under Subpart C. For example, a public undergraduate institution may administer an exchange program with a private undergraduate institution which admits only students of one sex because Subpart C permits the private institution to have such an admissions policy.

Section 86.31(b)(6) forbids application by recipients of residency and domicile rules in a manner which discriminates on the basis of sex. For example, many educational institutions base their determinations of eligibility for in-state tuition on domicile; applicable state law may require a married woman to take the domicile of her husband as of the date of marriage, or further require a year of residency to demonstrate domicile. If a male student domiciled in State A marries a female student domiciled in State B, and they then move to State B where the woman continues in school and the man begins school, he may not be entitled to in-state tuition in State B until he has lived there for a year. Additionally, as the wife must take her husband's domicile, she will lose her in-state tuition eligibility. If, instead, the woman were from State A and the man from State B, both would have been entitled immediately to in-state tuition in State B. Application of such rules would be prohibited under § 86.31(b)(6). See Samuel v. University of Pittsburgh, et al., F. Supp. (W.D. Pa., No. 71-1202, April 10, 1974).

Section 86.31(b)(7) prohibits a recipient from assisting another party which discriminates on the basis of sex in serving students or employees of that recipient. This section might apply, for example, to financial support by the recipient to a community recreational group or to official institutional sanction of a professional or social organization. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient subject to the regulation and the other party involved, including the financial support by the recipient, and whether the other party's activities relate so closely to the recipient's educational program or activity, or to students or employees in that program, that they fairly should be considered as activities of the recipient itself. (Under § 86.6(c), a recipient's obligations are not changed by membership in any league or other organization whose rules require or permit discrimination on the basis of sex.)

A recipient is required to develop and implement a procedure to ensure that the operator or sponsor of an educational program or activity not operated wholly by such recipient, in which the recipient assists participation by its students and employees, takes no action which the regulation would prohibit the recipient from taking. This requirement would apply, for example, to a college's responsibility to ensure nondiscrimination in teaching assignments of student teachers from its education school in schools not operated by the college. If the recipient finds that such discrimination is taking place and is unable to secure its prompt correction, it is required to end its connection with the operating or sponsoring entity (§ 86.31(c)).

With respect to housing, § 86.32 provides that a recipient may not discriminate in any aspect of the provision of housing except that, as provided in the statute, housing may be separate on the basis of sex. Thus, all rules, fees, and other requirements must not discriminate on the basis of sex, and the housing provided or otherwise made available (*e.g.* through listing) must be proportionate in quantity to the number of applicants for housing of each sex and comparable in quality and cost to the student. Moreover, a recipient must administer rules concerning off-campus housing (*e.g.* rules concerning which students

may live off campus) without discrimination. To the extent that it approves, or assists students in obtaining, off-campus housing, it must take whatever steps it believes necessary to assure that the off-campus housing available to members of one sex, when compared to that available to members of the other sex, is proportionate in quantity to the numbers of applicants of each sex as well as comparable in quality and cost.

Separate toilet, locker room and shower facilities on the basis of sex may be provided, but such facilities as are provided must be comparable in quality and number for men and women (§ 86.33).

Section 86.34(a) covers access to course offerings and other aspects of a recipient's educational program or activity. No course offerings may be conducted separately on the basis of sex including health, physical education, industrial arts, business, vocational, technical, home economics, music, and adult education, and no student may be required to participate or be refused participation in any course offering on the basis of sex. Section 86.34(b) provides that local educational agencies, in which admission to individual schools are exempt, nevertheless may not discriminate in admissions to the vocational institutions (see Subpart B). In addition, they may not discriminate in admissions to any other school or educational unit which they operate (*e.g.* a special high school operated for boys) unless they otherwise make available to students of the sex excluded, pursuant to the same policies and criteria of admission, comparable courses, services and facilities. Section 86.34(d) requires use of nondiscriminatory appraisal and counseling materials.

The Department recognizes that sex stereotyping in curricula and educational materials is a serious problem to which Title IX could well apply, but the Department has concluded that specific regulatory provisions in this area would raise grave constitutional problems concerning the right of free speech under the First Amendment to the Constitution, and for that reason the Secretary has not covered this subject matter in the proposed regulation. The Department assumes that recipients will deal with this problem in the exercise of their general authority and control over curricula and course content. For its part the Department will increase its efforts, through the Office of Education, to provide research, assistance and guidance to local education agencies in eliminating sex bias from curricula and educational materials.

Section 86.35 requires that provision of financial aid, assistance in making outside employment available to students, and employment of students by a recipient must be undertaken in a nondiscriminatory manner.

Section 86.35(a) prohibits different amounts and types of all forms of student financial aid to members of one sex. Section 86.35(a) prohibits a college or university subject to Title IX from assisting private fellowship or scholarship programs which are limited to members of one sex or for which members of each sex are selected separately. There may be appropriate remedial action in this area, including temporarily considering a student's sex in awarding financial aid. This section does not apply to a recipient's assisting in the administration of a scholarship or fellowship program established under a foreign will, trust or similar legal instrument, or by a foreign government, which differentiates between the sexes. The Secretary believes that the statute was not intended to cover such programs. The Secretary is aware of the problems raised by financial aid limited to members of one sex by a domestic bequest, deed of trust, or other instruments and invites comment in this area.

Under § 86.36, recipients may not discriminate in the provision of medical, hospital, accident, or life insurance benefits, services, policies or plans to any of their students, and recipients may not provide such benefits, service, policies or plans or otherwise discriminate, in any manner which would violate the employment sections of the regulation (Subpart E) if the action were to be taken with respect to employees. The section does not, however, prohibit recipients from providing any benefits or services which may be used by a different proportion of students of one sex than of the other, including but not limited to family planning services.

Section 86.37 provides generally that recipients may not apply rules concerning a student's actual or potential parental, family, or marital status in a discriminatory manner, and it provides specific prohibitions regarding discrimination against students on account of pregnancy, childbirth, or pregnancy-related disabilities. A student may not be excluded from regular classes because of pregnancy or related conditions unless she so requests or unless her physician certifies that a different arrangement is necessary. The regulation reflects the principle that disabilities related to pregnancy should be treated like any other disability.

Section 86.38 imposes requirements concerning physical education and athletic programs, which are integral parts of the educational processes of schools and colleges and are fully subject to the requirements of Title IX. See Brenden v. Independent School District 742, 477 F. 2d 1292, 1292–96 (8th Cir. 1973); compare Bucha v. Illinois High School Association, 351 F. Supp. 69 (N.D. Ill. 1972).

Section 86.38(a) provides that physical education classes and athletic programs must be operated without discrimination on the basis of sex. Such activities for which participation or selection is premised on factors other than skill may not be conducted separately on the basis of sex. Athletics for which selection is based on competitive skill may be provided through separate teams for males and females to the extent such teams comply with the requirements of §§ 86.38 (b) through (e), which are summarized below. (The award of scholarships for participation on a single sex team will not be interpreted as a single sex scholarship prohibited by § 86.35(a) so long as the recipient complies with the requirements of § 86.38, providing for equal opportunity in athletics.)

Recipients must determine in what sports students of both sexes desire to participate (§ 86.38(b)). Where athletic opportunities for students of one sex have previously been limited, a recipient must make affirmative efforts to inform students of that sex of the availability of equal opportunities for them, and to provide support and training to enable them to participate in those opportunities (§ 86.38(c)).

Section 86.38(d) requires that a recipient make affirmative efforts to provide athletic opportunities in such sports and through such teams as will most effectively equalize opportunities for members of both sexes, and in so doing consider the determinations of student interest made pursuant to § 86.38(b). The regulation does not require equal aggregate expenditures for athletics for members of each sex nor equal expenditures for each team (§ 86.38(e)).

Subpart E. Subpart E proposes requirements concerning employment which generally follow those of the Equal Employment Opportunity Commission (29 CFR Part 1604), and the Department of Labor's Office of Federal Contract Compliance (41 CFR Part 60). The EEOC administers Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, and the OFCC is responsible for the coordination of implementation of Executive Order 11246, as amended, which prohibits employment discrimination by Federal contractors. This Department is responsible for administration, pursuant to the OFCC regulations, of the Executive Order as to Federal contractors which are educational institutions. Virtually all recipients subject to Part 86 are also subject to Title VII, and many are also subject to the Executive Order. Where Subpart E of Title IX differs from either the Title VII regulations or those under Executive Order 11246, an employer who complies with this proposed regulation would also be complying with both Title VII and Executive Order, even where the latter provisions differ from each other, with the exception of fringe benefits as discussed in the following paragraph.

Section 86.46(b)(2) of Subpart E follows the Executive Order regulations in requiring that fringe benefit plans provide for either equal periodic benefits to members of each sex, or equal contributions by the employer for members of each sex (§ 86.36 imposes identical requirements for student benefit plans).

The Title VII regulation differs in that it prohibits payment of unequal periodic benefits on the basis of sex, and precludes employers from justifying unequal periodic benefits on the basis of differences in cost for males and for females. Assuming different life spans at particular ages between the sexes, and assuming equal contributions by all employees, Title VII implicitly requires payment of higher employer contributions for, and

the possibility of higher total benefits received by women. (The Department of Labor is currently considering changes in the Executive Order regulations. One of the proposed changes would result in conforming the fringe benefit requirements with those in effect under Title VII. (See 38 FR 35336–28, December 27, 1973.)

The Secretary has considered a third alternative for possible adoption by the Department. That proposal would mandate the use of premium or rate tables which do not differentiate on the basis of sex, and would thus require both equal contributions and equal periodic benefits. The Secretary invites comment specifically on whether § 86.46(b)(2) should adopt the Executive Order approach, as it does presently, that of Title VII, or the third alternative as set forth above.

The regulation applies to part-time employees § 86.41(a)(2)). The Secretary will interpret the section concerning fringe benefits (§ 86.46) to require, where an institution's female permanent employees are disproportionately part-time or its permanent part-time employees are disproportionately female, and the institution does not provide its permanent part-time employees fringe benefits proportionate to those provided full-time employees, that the institution demonstrate that such a manner of providing fringe benefits does not discriminate on the basis of sex. "Permanent" would refer to any employee who is expected to work or has in fact worked at least one academic semester at half-time or half-time equivalent. The Secretary seeks comment on the implications of requiring all institutions to provide permanent part-time employees fringe benefits proportionate to those offered full-time employees, regardless of the relative composition of a particular institution's part-time and full-time work forces or of the ratio of part-time and full-time employment among its female employees.

The Secretary sees no reason for treating disabilities relating to pregnancy differently from other temporary disabilities in the context of educational institutions. Accordingly, § 86.47(b) reflects the more detailed Title VII regulation rather than the Executive Order regulation. Section 86.47(c) also follows the Title VII regulation in requiring not only that disabilities related to pregnancy must be considered a justification for leave, but that where an employer provides for temporary disabilities under its fringe benefit or leave plan, disabilities related to pregnancy must be treated in the same manner as any other temporary disability.

Section 86.47(e) provides that an employee may not be required to commence leave related to pregnancy so long as her physician certifies that she is capable of performing her duties, and that she must be allowed to resume work after such a leave no more than two weeks after her physician certifies that she is capable of doing so, or in the case of an employee who is a teacher, at the beginning of the first academic term after such certification is made. These rules are consistent with the recent holding of the Supreme Court in Cleveland Board of Education v. LaFleur, 94 S.Ct. 791 (1974).

Although LaFleur apparently permits an employer to require that every pregnant teacher commence leave "at some firm date during the last few weeks of pregnancy," *Id.* at 799, n. 13, there is no clear medical evidence as to what such date might be generally appropriate, and the Secretary believes individualized determinations based on the employee's own capacities should be required instead.

Section 86.50(a) departs from both the Title VII and the Executive Order regulations in prohibiting pre-employment inquiries as to an applicant's marital status, as such inquiries are frequently the predicate for discrimination against married women. Section 86.21 (c)(4) contains a similar prohibition with regard to pre-admission inquiries. Section 86.51 follows the Title VII and Executive Order regulations in providing for consideration of sex in making employment decisions where sex is a "*bona fide* occupational qualification." (The Title VII exemption is provided for by the statute; the Executive Order exemption is intended simply to be consistent with that legislation.) Section 86.51 is included only for consistency with those regulations.

Subpart F. As noted above, Subpart F sets forth the procedures which would govern implementation of the proposed regulations. These procedures are in most respects similar to those contained in the Department's regulation implementing Title VI of the Civil Rights Act of 1964, 45 CFR Parts 80 and 81. Several of the provisions, however, are particularly noteworthy.

The provision for amicus participation under Title VI is contained in the procedural rather than the substantive regulation and may be found at 45 CFR 81.22. Amicus participation under Title IX will be included when procedural regulations are issued.

The Office for Civil Rights has previously distributed a Memorandum to Presidents of Institutions of Higher Education Participating in Federal Assistance Programs (August 1972), a Memorandum for Directors of Institutions of Vocational Education Participating in Federal Assistance Programs (May 1973), and a Memorandum for Chief State School Officers and Local School Superintendents (February 1973), all of which describe the basic applicability of Title IX, and the Office for Civil Rights and the Office of Education have jointly distributed a Memorandum for Presidents of Selected Institutions of Higher Education Participating in Federal Assistance Programs (May 1973), which describes the criteria and procedures under which certain formerly single-sex institutions may operate pursuant to a plan for transition to nondiscriminatory admissions. These documents are consistent, with certain minor exceptions, with the provisions of proposed Part 86 (the requirements of Part 86 which correspond to those of the Memorandum for Presidents of Selected Institutions are contained in §§ 86.15 and 86.16).

Persons who wish to submit comments, suggestions, or objections pertaining to these regulations may present their views, in writing, to the Director of the Office of Civil Rights of the Department of Health, Education, and Welfare, P.O. Box 2974, Washington, D.C. 20013. The Secretary believes that the comment period should extend for at least thirty days into the autumn academic semester, to enable academic institutions and student and faculty groups to formulate comments, and comments may therefore be submitted through October 15, 1974. Comments received in response to this notice will be available for public inspection in Room 3256, 330 Independence Avenue, SW., Washington, D.C. 20201, between 9 a.m. and 5:30 p.m., Monday through Friday (except Federal holidays) both before and after October 15, 1974, until the regulation is published in final form. Copies of representative comments received by the Director will also be made available for public inspection in the office of each Regional Director of the Office for Civil Rights during normal business hours before and after October 15, 1974. The Regional Directors and their offices are located as follows:

Region I—Mr. John G. Bynoe, RKO General Bldg., 5th Floor, Bulfinch Place, Boston, Massachusetts 02114.

Region II—Mr. Joel Barkan, 26 Federal Plaza, Rm. 3908, New York, New York 10007.

Region III—Mr. Dewey Dodds, Gateway Bldg., 3535 Market Street, Philadelphia, Pennsylvania 19101.

Region IV—Mr. William Thomas, 50 Seventh Street, NE, Rm. 404, Atlanta, Georgia 30323.

Region V—Mr. Kenneth A. Mines, 309 W. Jackson Blvd., 10th Floor, Chicago, Illinois 60606.

Region VI—Ms. Dorothy D. Stuck, 1114 Commerce Street, Dallas, Texas 75202.

Region VII—Mr. Taylor D. August, 12 Grand Bldg., 12th and Grand Avenue, Kansas City, Missouri 64106.

Region VIII—Mr. Gilbert D. Roman, Rm. 11037 Federal Bldg., 1961 Stout Street, Denver, Colorado 80202.

Region IX—Mr. Floyd L. Pierce, 760 Market Street, Rm. 700, San Francisco, California 94102.

Region X—Ms. Marialna Kiner, 6101 Arcade Plaza Bldg., 1321 Second Avenue, Seattle, Washington 98101.

Comments received before October 15, 1974, will be considered before final action is taken on this proposal. Comments received after that date will be considered until the regulation is prepared in final form. The proposal may be changed in the light of the comments received. In the next several weeks, the Department will hold public forums in various cities to brief the public and media and to enter into a question and answer dialogue with the public about the proposed regulation. It is hoped that these forums will increase public awareness of the issues and assist interested citizens in developing formal comments to be later submitted to the Department.

This Part 86 is proposed under the authority of section 902 of the Education Amendments of 1972 (20 U.S.C. 1682).

In consideration of the foregoing, it is proposed to add Part 86 to Title 45 of the Code of Federal Regulations to read as set forth below.

Dated: June 14, 1974.

CASPAR W. WEINBERGER,
Secretary, Department of Health, Education, and Welfare.

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX UNDER FEDERALLY ASSISTED EDUCATION PROGRAMS AND ACTIVITIES

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86.62 Conduct of investigations.
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AUTHORITY: Section 902 of the Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682.

Subpart A—Introduction

§ 86.1 Purpose.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.2 Definitions.

As used in this part, the term—

(a) *"Title IX"* means title IX of the Education Amendments of 1972, Pub. L. 92–318, 20 U.S.C. 1681 *et seq.*

(b) *"Department"* means the Department of Health, Education, and Welfare.

(c) *"Secretary"* means the Secretary of Health, Education, and Welfare.

(d) *"Director"* means the Director of the Office for Civil Rights of the Department.

(e) *"Reviewing Authority"* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *"Administrative law judge"* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal funds, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *"Recipient"* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) *"Applicant"* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) *"Educational institution"* means a local educational agency as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n).

(k) *"Institution of graduate higher education"* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) *"Institution of undergraduate higher education"* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) an agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) *"Institution of professional education"* means an institution (except an institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the United States Commissioner of Education.

(n) *"Institution of vocational education"* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semi-skilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full-time study.

(o) *"Administratively separate unit"* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) *"Admission"* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) *"Student"* means a person who has gained admission.

(r) *"Transition plan"* means a plan subject to the approval of the United States Commissioner of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.3 Remedial and affirmative actions.

(a) *Remedial action.* A recipient which has previously discriminated against persons on the basis of sex in an education program or activity shall take such remedial action as is necessary to overcome the effects of such previous discrimination.

(b) *Affirmative action.* In the absence of prior discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.4 Assurances required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the recipient, satisfactory to the Director, that each education program or activity operated by the recipient and to which this part applies will be operated in compliance with this part.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government ,both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of subpart B.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 799A and 845 of the Public Health Service Act (42 U.S.C. 295h–9 and 298b–2); title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate, or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.8 Designation of responsible employee.

Each recipient shall designate an employee to coordinate its efforts to comply with this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission or employment, students, employees, counselors of applicants for admission or employment, and other participants, beneficiaries, and other interested persons, that it does not discriminate on the basis of sex in the education programs or activities which it operates, and that it is required by title IX and this part not to discriminate in such manner. Such notification shall contain such information, and be made in such manner, as the Director finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § 86.9, or to the Director.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in: (i) local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of

the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart B—Coverage

§ 86.11 Application.

Except as provided in this subpart, this Part 86 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

§ 86.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An education institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so in writing to the Director when filing the assurance required by § 86.4, setting forth the extent of the requested exemption and enclosing a statement of the religious tenets under which the exemption is claimed and any other information which might aid the Director in determining whether the institution qualifies for such exemption.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.14 Admissions.

(a) *Administratively separate units.* For the purposes only of this section, §§ 86.15 and 86.16, and subpart C, each administratively separate unit shall be deemed to be an educational institution.

(b) *Application of subpart C.* Except as provided in paragraphs (c) and (d) of this section, subpart C applies to each recipient. A recipient to which subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(c) *Educational institutions.* Except as provided in paragraph (d) of this section as to recipients which are educational institutions, subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(d) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.15 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of subpart C unless it is carrying out a transition plan approved by the United States Commissioner of Education as described in § 86.16, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.16 Transition plans.

(a) *Submission of plans.* An institution to which § 86.15 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the United States Commissioner of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students, and if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 86.15 applies shall result in treatment of applicants to or students of such recipient in violation of subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 86.15 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.17–86.20 [Reserved]

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 86.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 86.15 and 86.16.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:

(i) give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which adversely affects any person on the basis of sex unless use of such test or criterion is shown to predict validly successful completion of the education program or activity in question.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admmission, or in making any offer of admission, a recipient to which this subpart applies:

(1) shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) shall not discriminate against or exclude any person on the basis of preg-

nancy, childbirth, miscarriage, abortion, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) shall treat disabilities related to pregnancy, childbirth, miscarriage, abortion, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) shall not make pre-admission inquiry as to the martial status of an applicant for admission, including whether such applicant is "Ms.," "Miss," or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.23 Recruitment.

(a) *Comparable recruitment.* A recipient to which this subpart applies shall make comparable efforts to recruit members of each sex, except that such recipient may be required to undertake additional recruitment efforts as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.24–86.30 [Reserved].

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

§ 86.31 Education programs and activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This supbart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which subpart C does not apply, or (2) an entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant;

(7) Aid or perpetuate discrimination against any person by assisting any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees; or

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Programs not operated by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to ensure that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.*

(1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such action as may be necessary to ensure that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole: (i) proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

§ 86.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

§ 86.34 Access to education program or activity.

(a) *Course offerings.* A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(b) *Local educational agencies.* A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(1) any institution of vocational education operated by such recipient; or

(2) any other school or educational unit operated by such recipient, unless such recipient otherwise make available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

(c) *Appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for different students on the basis of their sex or use materials which permit or require different treatment of students on such basis.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.35 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to any of its students a recipient shall not:

(i) On the basis of sex provide different amounts or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; or

(ii) through solicitation, listing, approval, provision of facilities, or other services assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex.

(2) This paragraph does not apply to assistance by a recipient in the administration of a scholarship, fellowship, or other financial assistance program which discriminates on the basis of sex and is established under a foreign will, trust, bequest, or similar legal instrument, or by a foreign government.

(b) *Assistance in making available employment.* A recipient which assists any agency, organization, or person in making employment available to any of its students:

(1) shall take such action as may be necessary to assure that such employment is made available without discrimination on the basis of sex; and

(2) shall not render such services to any agency, organization, or person which discriminates on the basis of sex in so making available such employment.

(c) *Employment of students.* A recipient which employs any of its students shall not do so in a manner which violates subpart E.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

(d) *Assistance related to athletics.* Notwithstanding the provisions of this section, separate financial assistance for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with § 86.38.

§ 86.36 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate subpart E if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.37 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extra-curricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, miscarriage, abortion, or recovery therefrom, unless:

(i) The student requests voluntarily to participate in a different such program or activity; or

(ii) The student's physician certifies to the recipient that such different participation is necessary for her physical, mental, or emotional well being.

(2) A recipient shall treat disabilities related to pregnancy, childbirth, false pregnancy, miscarriage, abortion, or recovery therefrom in the same manner and under the same policies as any temporary disability in any medical or hospital benefit, service, plan, or policy which such recipient administers, operates, offers, or participates in with regard to students admitted to the entity.

(3) In the case of a recipient which does not maintain a temporary disability policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy as a justification for a leave of absence for a reasonable period of time, the conclusion of which the student shall be reinstated to her original status.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.38 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any physical education or athletic program operated by a recipient, and no recipient shall provide any physical education or athletic program separately on such basis; provided, however, that a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill.

(b) *Determination of student interest.* A recipient which operates or sponsors athletics shall determine at least annually, using a method to be selected by the recipient which is acceptable to the Director, in what sports members of each sex would desire to compete.

(c) *Affirmative efforts.* A recipient which operates or sponsors athletic activities shall, with regard to members of a sex for which athletic opportunities previously have been limited, make affirmative efforts to:

(1) Inform members of such sex of the availability for them of athletic opportunities equal to those available for members of the other sex and of the nature of those opportunities, and

(2) Provide support and training activities for members of such sex designed to improve and expand their capabilities and interests to participate in such opportunities.

(d) *Equal opportunity.* A recipient which operates or sponsors athletics shall make affirmative efforts to provide athletic opportunities in such sports and through such teams as will most effectively equalize such opportunities for members of both sexes, taking into consideration the determination made pursuant to paragraph (b) of this section.

(e) *Separate teams.* A recipient which operates or sponsors separate teams for members of each sex shall not discriminate on the basis of sex therein in the provision of necessary equipment or supplies for each team, or in any other manner.

(f) *Expenditures.* Nothing in this section shall be interpreted to require equal aggregate expenditures for athletics for members of each sex.

§§ 86.39–86.40 [Reserved]

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

§ 86.41 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a manner which furthers equal employment opportunity regardless of sex, and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting individuals to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, pregnancy leave, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.42 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which adversely affects any person on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such adverse effect, are shown to be unavailable.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.43 Recruitment.

(a) *Comparable and affirmative recruiting.* If a recipient recruits applicants for employment, either generally or for particular positions, it shall make comparable efforts to recruit members of each sex in all such recruiting, except that a recipient shall make such affirmative attempts to recruit members of a sex which previously had limited employment participation as are necessary to overcome the effects of such limited participation.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.44 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Requires any person to perform duties for which compensation is lower than that for performance in a different position:

(1) Entailing similar duties or,

(2) The position description for which is limited to similar duties; or

(c) Makes any person subject to a position description under which compensation is lower than that for performance:

(1) Under a different position description which is limited to similar duties, or

(2) In a different position entailing duties similar to those set forth in such position description.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.45 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which operate to classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 86.51.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.46 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits" means any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provisions of § 86.44.

(b) *Prohibitions.* A recipient shall not:

(1) discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; and

(3) administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.47 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, or establish or follow any policy or practice which so discriminates or excludes. For the purpose of this subpart, "pregnancy" means the entire process of pregnancy, childbirth, and recovery therefrom, and includes false pregnancy, miscarriage, and abortion.

(c) *Pregnancy as a temporary disability.* A recipient shall treat disabilities caused or contributed to by pregnancy as temporary disabilities for all job-related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a temporary disability policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to her original job or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(e) *Inception of and return from pregnancy leave.* In complying with this section, a recipient shall not require any employee to:

(1) Begin leave related to pregnancy so long as the employee's physician certifies in writing that she is physically capable of performing her duties, provided that a pregnant employee shall notify her employer in writing of her expected date of delivery, at least 120 days prior to such date; or

(2) Return to her employment after a leave related to pregnancy later than two weeks after the employee's physician certifies in writing that she is physically capable of performing her duties, or in the case of any employee in a teaching position, later than the beginning of the first full academic term commencing after such certification is made.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.48 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.49 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona-fide occupational qualification for the particular job in question.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.50 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Ms., Miss, or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

§ 86.51 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room, or toilet facility used only be members of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.52–86.60 [Reserved]

Subpart F—Procedures

§ 86.61 Compliance information.

(a) *Cooperation and assistance.* The Director will to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and will provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the Director timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the Director may determine to be necessary to enable him or her to ascertain whether the recipient has complied or is complying with this part. For example, recipients shall have available for the Department data showing the extent to which members of the different sexes are students, employees or other beneficiaries of or participants in federally-assisted education programs and activities. In the case of any such program or activity under which one recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the Director during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities, and shall permit the Director to make copies of any such written information, as may be pertinent to ascertain compliance with this part. Where any informaiton required of a recipient is in the exclusive possession of any other agency, institution or person and such agency, institution or person fails or refuses to furnish such information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement will not be disclosed by the Department except where necessary in formal enforcement proceedings or where otherwise required by law.

(Sec. 902, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682)

§ 86.62 Conduct of investigations.

(a) *Periodic compliance reviews.* The Director will from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or herself or any specific class of individuals to be subjected to discrimination prohibited by this part may be himself or herself or by a representative file with the Director a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the Director, or unless the alleged discrimination took place after June 30, 1972, but prior to the effective date of this part. The Director shall notify each complainant promptly, in writing, that the complaint has been received.

(c) *Investigations.* The Director will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation will include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the Director will so inform the recipient and the complainant, if any, and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 86.63.

(2) If, after an investigation pursuant to paragraph (c) of this section, it appears that action pursuant to paragraph (d)(1) of this section is not warranted, the Director will so inform each complainant, in writing, and will give each complainant the opportunity to submit additional information, orally or in writing. Such information will be reviewed promptly and the Director will notify the complainant, in writing, of what action appears to be warranted in light of the information.

(3) If after an investigation pursuant to paragraph (c) of this section or after action required by paragraph (d)(2) of this section, it appears that action pursuant to paragraph (d)(1) of this section is not warranted, the Director will so inform the recipient and each complainant, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* Each recipient shall permit the Director to interview any of its students or employees without a representative of such recipient being present. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 901 of the Education Amendments of 1972 or this part, or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants will be kept confidential by the Department except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder, or where otherwise required by law.

(Sec. 902, Education Amendments of 1972, 86 Stat. 374, 20 U.S.C. 1682)

§ 86.63 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to award or continue Federal financial assistance in accordance with the procedures of paragraph (c) of this section or by any other means authorized by law. Such other means may include, but are not limited to, (1) a referral to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States, or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 86.4.* If an applicant or recipient fails or refuses to furnish an assurance required under § 86.4 or otherwise fails or refuses to

comply with a requirement imposed by or pursuant to that section, Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department will not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department will continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to award or continue Federal financial assistance will become effective until (1) the Director has advised the applicant or recipient of its failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been a finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, and (3) 30 days have expired after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to award or continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular education program or activity or part thereof in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law will be taken until (1) the Director has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person and the complainant, if any, has been notified of the recipient's failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts will be made to persuade the recipient or other person to comply with this part and to take such corrective action as may be appropriate.

(Secs. 902, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682)

§ 86.64 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 86.63(c), responsible notice will be given by registered or certified mail, return receipt requested, to each affected applicant or recipient. This notice will advise such applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request, by certified or registered mail addressed to the Director, that the matter be scheduled for hearing or (2) advise such applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed will be subject to change for cause. A copy of this notice will be mailed by certified mail, return receipt requested, to each individual complainant, and to each organization or group which has filed a complaint on behalf of one or more individuals pursuant to § 86.62(b), and each such complainant, organization, or group will be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 902 of the Education Amendments of 1972 and § 86.63 (c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings will be held before an administrative law judge designated in accordance with 5 U.S.C. 3105 and 3344. Hearings will be held at the offices of the Department in Washington, D.C., at a time fixed by the Director unless the administrative law judge determines that the convenience of the applicant or recipient or of the Department requires that another place be selected.

(c) *Participation as amicus curiae.* Each individual complainant, and each organization or group which has filed a complaint on behalf of one or more individuals, may petition the administrative law judge for leave to participate as *amicus curiae*, by giving testimony, by filing a brief, or both, in a hearing held pursuant to paragraph (a) of this section in any matter concerning which such complainant, organization, or group, has filed a complaint pursuant to § 86.62(b). Such petition shall be made no more than 20 days after the date of the notice prescribed by paragraph (a) of this section. Leave to participate as *amicus curiae* shall be liberally granted.

(d) *Right to counsel.* In all proceedings under this section, the recipient shall have the right to be represented by counsel.

(e) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with 5 U.S.C. 554–557 and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided by this part, may be reimbursed for his or her travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(f) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this part with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under title IX, the Director may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 86.65.

(Sec. 902, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682)

§ 86.65 Decisions and notices.

(a) *Decisions by administrative law judges.* Within 30 days after a hearing is held by an administrative law judge such administrative law judge shall either make an initial decision, if so authorized, or certify the entire record including his or her recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the administrative law judge, the applicant or recipient or the Department may within 20 days after is-

suance of the initial decision, file with the reviewing authority exceptions to the initial decision, with his or her reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision including the reasons therefor. In the absence of exceptions the initial tions the reviewing authority shall recision, subject to the provisions of paragraph (c) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of an administrative law judge pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 86.64(a) the reviewing authority shall make its final decision on the record or refer the matter to an administrative law judge for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of an administrative law judge or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraph (a), (b), or (c) of this section, a recipient or applicant or the Department may, within 30 days after issuance of the final decision by the reviewing authority, request the Secretary to review such decision. Such review is not a matter of right and will be granted only where the Secretary determines there are special and important reasons therefor. The Secretary's decision to undertake or not to undertake review will be communicated in writing, within 30 days after such request, to each party, including *amicus curiae*, if any. The Secretary may grant or deny such request, in whole or in part. He or she may also review such a decision upon his or her own motion in accordance with rules of procedure issued by the Director. The Secretary's decision to undertake such review will be communicated in writing within 30 days after the issuance of the reviewing authority's decision, to each party, including *amicus curiae*. Failure of an applicant or recipient to file an exception with the reviewing authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Final agency action for purposes of judicial review.* (1) Except as provided in paragraph (f)(2) of this section, a decision under this section will become the final decision of the Department and will constitute final agency action within the meaning of section 704 of title 5 of the United States Code in the following manner:

(i) A decision by an administrative law judge pursuant to paragraph (a) will become final on the 21st day after such decision is made, unless prior to such day review by the reviewing authority has been requested.

(ii) A decision by the reviewing authority pursuant to paragraph (b) of this section will become final on the 31st day following its issuance unless review by the Secretary is requested prior to such day under paragraph (e) of this section, or unless the Secretary undertakes review on his or her own motion prior to such day under paragraph (e) of this section; or on the 31st day following a request that the Secretary review such decision under paragraph (e) of this section, unless the Secretary prior to such day grants such review.

(iii) A decision of the Secretary under paragraph (c) of this section will become final on the day following its issuance.

(2) A decision to terminate or to refuse to grant or continue Federal financial assistance, which would otherwise constitute the final decision of the Department and final agency action pursuant to paragraph (f)(1) of this section, shall not constitute such action until the Secretary transmits it as such to the appropriate Congressional committees with the report required under section 902 of the Education Amendments of 1972.

(g) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this part applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of title IX and this part, including provisions designed to assure that no Federal financial assistance to which this part applies will thereafter be extended to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this part, or to have otherwise failed to comply with this part unless and until it corrects its noncompliance and satisfies the Director that it will fully comply with this part.

(h) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (g) of this section may at any time request the Director to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (h)(1) of this section. If the Director determines that those requirements have been satisfied, he or she will restore such eligibility.

(3) If the Director denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the Director. The applicant or recipient will be restored to such eligibility if it proves at such hearing that it satisfied the requirements of paragraph (h)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

(4) The pendency of any proceeding under this paragraph shall not lift or stay the sanctions imposed by the order issued under paragraph (g) of this section.

(Sec. 902, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682)

§ 86.66 Judicial review.

Action taken pursuant to section 902 of the Education Amendments of 1972 is subject to judicial review is provided in section 903 of the Amendments.

(Sec. 902, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682)

[FR Doc.74-14197 Filed 6-19-74;8:45 am]

"Bureaucrat's Bible" or
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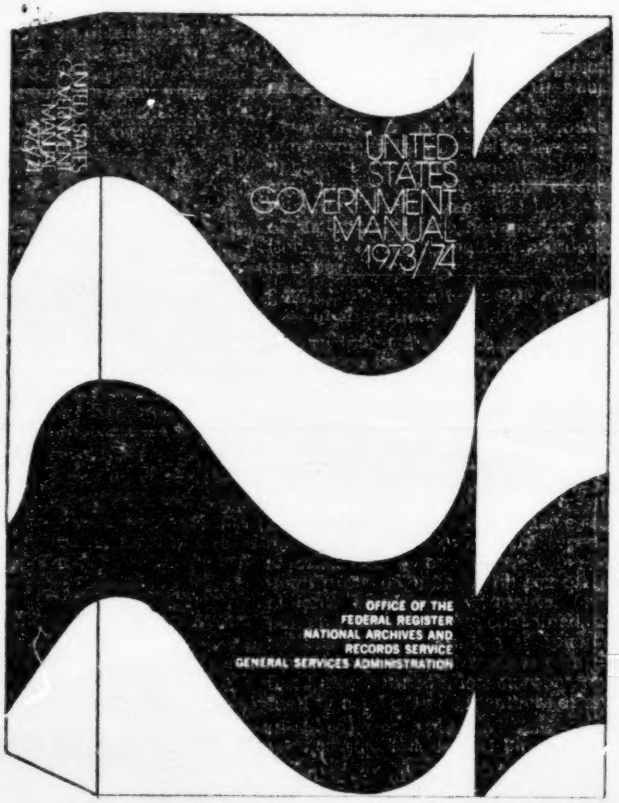
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